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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

PAUL A. BILZERIAN,
Petitioner,

v.

HSSM #7 LIMITED PARTNERSHIP,
Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

PAUL A. BILZERIAN, *Pro Se*
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May 16, 1997

56pp

QUESTIONS PRESENTED

1. Whether, under § 523(a)(2)(A) of the bankruptcy code, punitive damages are dischargeable.

2. Whether, under § 523(a)(2)(A) of the bankruptcy code, a creditor is required to prove that he sustained an actual loss.

3. Whether, under § 523(a)(2)(A) of the bankruptcy code, a creditor is required to prove that the debtor **actually obtained** money or property from the creditor.

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case. There is no parent or subsidiary company of any party to be listed.

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Petition for a Writ of Certiorari to the
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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Paul A. Bilzerian, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 100 F.3d 886 and is reprinted in the Appendix at pages A1 - A12. The unreported opinion of the District Court is reprinted in the Appendix at pages A13 - A27. The opinion of the Bankruptcy Court is reported at 162 B.R. 583 and is reprinted in the Appendix at pages A28 - A38.

JURISDICTION

The Court of Appeals issued its judgment and opinion on December 3, 1996. Petitioner filed a timely motion for rehearing, which was denied by the Court of Appeals on February 18, 1997. Appendix at A39. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The pertinent statute is 11 U.S.C. § 523(a)(2)(A), which is set forth below:

> A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition.

STATEMENT OF FACTS

In 1984, I began doing business with Craig Hall, a sophisticated businessman who had negotiated hundreds of contracts and who was the general partner for about 300 partnerships. In 1985, Hall committed to loan me several million dollars in my attempt to acquire the Cluett, Peabody Company, for which he made a profit of $5.5 million in a few months. In 1986, Hall invested $3 million in one of my partnerships involved in acquiring Hammermill Paper Company and made a profit of $1.3 million in 90 days.

By May 1987, I had been involved in numerous, highly successful and highly publicized transactions with some of America's wealthiest investors, including Mr. DeBartolo (owner of the San Francisco 49ers), Alex Spanos (owner of the San Diego Chargers), and others. At that same time, Hall was experiencing massive financial problems, including the restructuring of $1 billion in debt. Nonetheless, prior to his financial problems, Hall had established two partnerships to invest in corporate acquisitions. Because Hall could no longer finance an acquisition, he asked me to allow him and his partnerships to invest in my next acquisition. So, in May 1987, when I

formed my next partnership, BPLP B, which required a minimum investment of $25 million, notwithstanding the fact that Hall was unable to invest the minimum amount of $25 million, and notwithstanding the fact that I had to form another partnership (Suncoast) and invest an additional $5 million to make up for Hall's shortfall, I accepted HSSM (Hall's partnership) in place of several other more qualified investors. Several months later, as a favor to Hall, I agreed to give HSSM an option to sell me HSSM's interest in Suncoast at "market value" during March of each year.

BPLP B made a series of investments in 1987, including an investment in another partnership, BPLP 1, which then acquired the Singer Company for $2 billion in February, 1988. In March, 1988, HSSM elected not to exercise its option to have me purchase its investment in Suncoast. Shortly thereafter, however, Hall began pressuring me to help him sell his investment in Suncoast. On December 22, 1988, I was indicted for alleged disclosure violations involving the securities of Cluett and Hammermill, the first two transactions that Hall and I were involved in together.

The Texas Case

Hall alleged that, in late 1988, I agreed to purchase HSSM's interest in Suncoast for $40 million, or twice HSSM's investment. Hall also alleged that, in early 1989, I offered to buy HSSM's interest in Suncoast for $33-34 million, a $13-14 million profit for HSSM, which Hall rejected as too low. Hall demanded the $40 million price, which Hall claimed I had agreed to, and threatened to sue me if I did not pay the $40 million. On the eve of my criminal trial, HSSM sued me for three causes of action: (1) common-law fraud, which alleged unspecified damages; (2) specific performance of the Suncoast Agreement, which sought a judgment requiring me to repurchase HSSM's investment in Suncoast at "market value", which HSSM claimed was $40 million, or twice HSSM's investment; and (3) a claim in equity for recission of the Suncoast Agreement based on fraud in the inducement. HSSM's equitable claim for fraud in the inducement was based on the allegation that I had failed to disclose that the success of my prior business deals was based on violations of the securities laws rather than my skill and experience.

Moments before the start of the Texas trial, HSSM dismissed its com-

mon-law fraud claim because it could not claim a monetary loss, a necessary element to common-law fraud, while simultaneously claiming that the "fair market value" of HSSM's interest in Suncoast was worth $40 million, or twice the amount of HSSM's original investment.

On July 30, 1990, the jury returned a verdict in favor of HSSM on both remaining counts[1] and determined that HSSM's investment in Suncoast was worth $34.2 million, or $14 million more than HSSM invested in Suncoast. Notwithstanding the verdict, the Texas Court dismissed the count for specific performance, which left HSSM with a Judgment, in equity, for recission of the Suncoast agreement. The HSSM Judgment required me to repurchase from HSSM its investment in Suncoast for cost, or $20 million, and awarded HSSM punitive damages of $1.224 million and prejudgment interest of $7 million. On appeal to the Fifth Circuit, HSSM argued strenuously that loss was not necessary to prevail in its equitable claim for fraud in the inducement. The Fifth Circuit affirmed.

On August 5, 1991, I filed for bankruptcy. HSSM brought a thirteen count adversary proceeding against me in the bankruptcy court, seeking a determination that its prior judgment in equity for recission of the Suncoast contract was nondischargeable under 11 U.S.C. §§ 523(a)(2)(A), (a)(4) and (a)(6). HSSM filed a motion for summary judgment and I filed a brief in opposition to HSSM's motion for summary judgment and a cross motion for summary judgment. The bankruptcy court (Paskay, CJ) denied HSSM's motion under all three sections, denied my motion for summary judgment under § 523(a)(6), and granted my motion for summary judgment under §§ 523(a)(2)(A) and(a)(4). With respect to 523(a)(2)(A), the bankruptcy court's summary judgment in my favor was based on **the court's factual finding that I had not obtained any money from HSSM.** In re Bilzerian, 162 B.R. 583 (Bank.M.D.Fla.1993).

Thereafter, HSSM voluntarily dismissed eleven counts, including its cause of action under § 523(a)(6), and appealed to the district court only the summary judgment in my favor with respect to § 523(a)(2)(A). The district court reversed the bankruptcy court after determining that the bankruptcy court had applied an incorrect view of the law, and held that a creditor is

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[1]As I stated earlier, HSSM dismissed its common-law fraud claim, with prejudice.

not required to prove that the debtor actually obtained money from the creditor. The district court held that the creditor is only required to present *some* evidence that the debtor had the possibility of receiving *some* unquantified, contingent, indirect benefit.

However, the district court did not remand the case to the bankruptcy court for a further determination of HSSM's claim in light of its ruling. Instead, the district court determined that "the record contains evidence of a benefit to Bilzerian" and then stated that "the bankruptcy court should have addressed the other elements for a case of nondischargeability under § 523(a)(2)(A)" and summarily awarded judgment to HSSM.

I appealed to the Eleventh Circuit which affirmed the district court's ruling in a published decision.

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD RESOLVE A CONFLICT BETWEEN THREE CIRCUIT COURTS ON THE ISSUE OF WHETHER PUNITIVE DAMAGES (AND PREJUDGMENT INTEREST) SHOULD BE DISCHARGEABLE UNDER § 523(a)(2)(A).

The Third, Ninth and Eleventh Circuits are in clear conflict over the important federal question of whether punitive damages are dischargeable in bankruptcy under § 523(a)(2)(A). See In re Cohen, 106 F.3d 52 (3rd Cir.1997); In re Levy, 951 F.2d 196 (9th Cir. 1991); In re St. Laurent, 991 F.2d 672 (11th Cir.1993).

A divided panel of the Third Circuit recently held that punitive damages are nondischargeable under § 523(a)(2)(A). In re Cohen. However, Judge Greenberg's dissenting opinion states that "treating 'to the extent obtained' as referring to 'money, property, [or] services,' makes it clear ... that punitive damages are dischargeable, for the punitive damages do not reflect money, property or services the debtor obtained. Punitive damages are simply a penalty and are something the debtor pays rather than obtains." In re Cohen, at 59-61 (Greenberg, J., dissenting).

The Ninth Circuit, the first circuit court to address the issue, recog-

nized that when Congress amended § 523(a)(2) to add the language "to the extent obtained by", it did so to "limit the nondischargeable debt to the amount 'obtained by actual fraud.'" In re Levy, at 198. The Ninth Circuit concluded that punitive damages should be discharged under § 523(a)(2).

Although the Eleventh Circuit recognized that "most [bankruptcy courts] adhere to the view that [punitive damage] awards are dischargeable", the court held that punitive damages are not dischargeable under § 523(a)(2). In re St. Laurent, 991 F.2d 672 (11th Cir.1993). The Eleventh Circuit also "decline[d] to accord much weight" to this Court's statement that "arguably, fraud judgments in cases in which the defendant did not obtain money, property, or services from the plaintiffs and those judgments that include punitive damages awards are more appropriately governed by § 523(a)(6)." St. Laurent at 681 (quoting Grogan v. Garner, 498 U.S. 279, 282 n.2, 111 S.Ct. 654, 657 n.2 (1991)).[2]

Over the past five years there have been more than 700 published decisions involving § 523(a)(2) of the bankruptcy code. Many of those cases involve punitive damages and prejudgment interest that far exceed the amount of the underlying compensatory debt. Bankruptcy courts, district courts and circuit courts are all well aware of the conflict that exists on the issue of the dischargeability of punitive damages and prejudgment interest under § 523(a)(2)(A). See In re Spicer, 57 F.3d 1152, 1160 (D.C.Cir.1995) ("Courts are divided on the question of whether punitive damages awarded in fraud cases are nondischargeable."); In re George, 205 B.R. 679 (Bank.D.Conn.1997) (quoting 4 Collier on Bankruptcy, ¶ 523.08[4] at 523-53 (15th ed. rev'd 1996), "the plain language of section 523(a)(2), as well as the narrow construction normally given to discharge exceptions, dictate that it should not apply to punitive damages", and then holding that punitive damages are nondischargeable); In re Auricchio, 196 B.R. 279, 290 (Bank. D.N.J.1996) ("most courts have found that punitive damages awards are dischargeable under § 523(a)(2)" and collecting cases).

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[2]The Eleventh Circuit did not offer any alternative explanation as to why Congress added the specific language "to the extent obtained by" when it enacted the 1984 bankruptcy code amendment. The court only stated it was "unclear" what Congress meant and that the language "to the extent obtained by" was not "conclusive proof" that Congress intended to limit the breadth of § 523(a)(2). In re St. Laurent at 679.

This Court should grant my Petition to resolve this important bankruptcy question, which has divided three circuit courts, as well as numerous other courts across the United States, producing disparate results for creditors and debtors alike.

II. THE COURT SHOULD RESOLVE THE CONFLICT BETWEEN THIS CASE AND FIELD V. MANS, WHICH HELD THAT A CREDITOR SHOULD BE REQUIRED TO PROVE AN ACTUAL LOSS IN ORDER TO PREVAIL UNDER § 523(a)(2)(A).

This Court recently held in Field v. Mans, 116 S.Ct. 437 (1995), that § 523(a)(2)(A) would be construed to incorporate general common law of torts in order to allow creditors to recover **losses** resulting from common-law torts. It would seem clear that Field v. Mans embodies the proposition that a creditor is required to prove an actual loss in order to prevail under § 523(a)(2)(A). The ruling by the Eleventh Circuit in this case, which excepted from discharge a judgment **in equity for recission of a contract, and not for damages,** under § 523(a)(2)(A), surely conflicts with the fundamental premise of Field v. Mans.

In this case, HSSM did not even allege a loss in its complaint and did not present any evidence of loss to the bankruptcy court. In fact, in the Texas case, after HSSM dismissed its claim for damages due to common-law fraud, HSSM argued to the Texas jury that its Suncoast investment was worth $40 million. The trial court's findings of fact and the jury's verdict both stated that HSSM's investment in Suncoast was worth **"$34,272,000".**

The HSSM Judgment requires me to repurchase HSSM's investment in Suncoast for HSSM's cost (approximately $20 million) and, in return, for HSSM to transfer ownership of its interest in Suncoast to me. There are fundamental problems with excepting such a judgment from discharge. Should such a judgment be considered an executory contract? Should the chapter 7 trustee consider the contract an asset of the estate? Should the creditor be liable to the debtor for any actions it takes to diminish the value of the asset or for failing to take action to maximize the value of the asset to be repurchased? The Eleventh Circuit's decision in this case does nothing to address any of these questions.

Although this Court's decision in Field v. Mans rests on the fundamental premise that only a debt for an actual loss by a creditor should be excepted from discharge under § 523(a)(2)(A), the Eleventh Circuit's ruling in this case reached a contrary result. This Court should grant my Petition and resolve this apparent conflict.

III. THIS COURT SHOULD DECIDE THE IMPORTANT BANKRUPTCY ISSUE OF WHETHER A CREDITOR SHOULD BE REQUIRED TO PROVE THAT THE DEBTOR ACTUALLY OBTAINED *SOME* BENEFIT IN ORDER TO PREVAIL UNDER § 523(a)(2)(A).

This Court stated in Grogan v. Garner, that "arguably, fraud judgments in cases in which the defendant did **not obtain** money, property, or services from the plaintiffs and those judgments that include punitive damages awards are more appropriately governed by § 523(a)(6)." Grogan v. Garner, 498 U.S. 279, 282 n.2, 111 S.Ct. 654, 657 n.2 (1991)) (emphasis added). Although this dicta can not be considered a holding, when considered in conjunction with this Court's holding in Field v. Mans, it would appear that only judgments where the debtor actually obtained money, property or services should be excepted from discharge under § 523(a)(2)(A).

In this case, it is undisputed that I did not obtain any money from HSSM, and that I did not obtain any actual benefit from HSSM's investment in Suncoast, and that I did not even have any potential of a direct benefit from HSSM's investment in Suncoast. The sole basis for the Eleventh Circuit's ruling in this case is that I had the *potential* to receive a contingent, indirect benefit in the event one of the partnerships that Suncoast invested in made a substantial profit on its investment. The Eleventh Circuit held that, under § 523(a)(2)(A), such an indirect, contingent, unrealized, potential benefit was sufficient to except the HSSM Judgment for recission of the Suncoast agreement.

The Eleventh Circuit acknowledged that the courts are divided on this issue. The Eleventh Circuit stated that, of the **three** views concerning the issue of what must be "obtained" by a debtor, the "receipt of benefits" theory is the more well-reasoned approach. At least one court has recently acknowledged a split between the Eleventh and Sixth Circuits on the issue

of whether a debtor must benefit from the alleged fraud in order for a debt to be nondischargeable. See In re Pauley, 205 B.R. 501, 507 fn.7 (Bank.W.D.Mich.1997)(citing a split between the Eleventh Circuit's decision in this case and the Sixth Circuit's decision in In re Brady, 101 F.3d 1165, 1172 (6th Cir.1996)).

This Court should determine whether, under § 523(a)(2)(A), the creditor must prove that the debtor actually received some money, property, services, or an economic benefit, rather than the mere possibility of a contingent, indirect benefit. The mere fact that a debtor could possibly have received a contingent, indirect benefit of $10 should not be sufficient to render nondischargeable a $20 million judgment for the recission of a contract.

The issues involved in this case all ask the same fundamental questions: To what extent is a debt excepted from discharge under § 523(a)(2)(A)? Are punitive damages excepted? Can a judgment in equity be excepted from discharge or must the judgment be for common-law fraud? Must the debtor obtain any money or property from the creditor? Must the debtor obtain an actual benefit from the fraudulent conduct? Must the creditor suffer a loss?

As Judge Greenberg recently observed "it is important to understand how broadly fraud has come to be defined." In re Cohen, at 61 (Greenberg, J., dissenting). In this case the fraud consisted of failing to inform a business partner that his $7 million of business profits from two previous transactions were the result of the other partner's disclosure violations rather than the result of his financial analysis and complex financing of two multi-billion dollar corporate acquisitions. And, despite the "fraudulent conduct", the jury found that the partner (and creditor) made $14 million on the next transaction. This case is the ultimate example that shows the term "fraud" has a broad reach.

If this Court were to allow the term "obtained by" to include a possible, unrealized, unquantified, contingent, indirect benefit to the debtor, it would render meaningless this Court's longstanding rule that exceptions to discharge are to be construed strictly in favor of the debtor. Gleason v. Thaw, 236 U.S. 558, 562, 35 S.Ct. 287, 289, 59 L.Ed. 717 (1915). Also see,

In re Menna, 16 F.3d 7, 9 (1st Cir.1994); In re Robinson, 776 F.2d 30, 38 (2nd Cir.1985); In re Bennett, 970 F.2d 138, 148 (5th Cir.1992); Werner v. Hofman, 5 F.3d 1170, 1172 (8th Cir. 1993); In re Hudson, 859 F.2d 1418, 1425 (9th Cir.1988). This Court should grant my Petition and decide these exceptionally important issues for all debtors and creditors.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be granted.

Respectfully submitted,

PAUL A. BILZERIAN, *Pro Se*
16229 Villarreal de Avila
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Petitioner

Dated: May 16, 1997

APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED DECEMBER 3, 1996

Reported at 100 F.3d 886

In re Paul A. BILZERIAN, Debtor.
HSSM # 7 LIMITED PARTNERSHIP, Plaintiff-Appellee,
v.
Paul A. BILZERIAN, Defendant-Appellant.

No. 95-2988

Non-Argument Calendar.

United States Court of Appeals,

Eleventh Circuit.

Dec. 3, 1996.

Paul A. Bilzerian, Tampa, FL, pro se.

Mary R. Houston, Orlando, FL, for Plaintiff-Appellee.

Appeal from the United States District Court for the Middle District of Florida.

Before KRAVITCH, COX and DUBINA, Circuit Judges.

PER CURIAM:

In this case, the district court reversed the bankruptcy court's holding that a fraud judgment debt owed by appellant Paul A. Bilzerian ("Bilzerian") to appellee HSSM # 7 Limited Partnership ("HSSM") was dischargeable. Bilzerian, a Chapter 7 debtor, appeals pro se the district court's reversal of the bankruptcy court's holding. Because we conclude that Bilzerian received a benefit from his fraud, and that collateral estoppel

prevents relitigation of the necessary elements of fraud under 11 U.S.C. § 523(a)(2)(A), we affirm the district court's judgment.

I. BACKGROUND

HSSM brought suit against Bilzerian and Bicoastal Financial Corporation ("BFC") in the United States District Court for the Northern District of Texas. In its fifth amended complaint, HSSM alleged that Bilzerian made a series of misrepresentations to HSSM to induce HSSM to invest $20.4 million in Suncoast Partners Limited Partnership ("Suncoast"). Such representations involved Bilzerian's skill and expertise in securities transactions and his agreement to repurchase HSSM's interest in Suncoast. The latter agreement, known as "the put," entailed Bilzerian's contracted agreement to purchase HSSM's interest in Suncoast at HSSM's election. The district court in Texas found that this arrangement:

> was a specifically negotiated contract provision resulting from the clear understanding of the parties that plaintiff HSSM ... needed the opportunity to have liquidity from its investment in Suncoast ... on an annual basis or it would not make the investment.... Without Section 5.6 in the partnership agreement, HSSM would not have become a partner in Suncoast.
>
> Findings of Fact and Conclusions of Law, BR42, Ex. F at 1-2.

The case was tried to a jury, which answered special interrogatories and returned a verdict in favor of HSSM and against Bilzerian and BFC, jointly and severally. The Texas district court entered judgment on the jury's verdict, and concluded that Bilzerian and BFC were guilty of actual fraud. Moreover, the district court rescinded the partnership agreement and ordered Bilzerian and BFC, jointly and severally, to pay HSSM $19.839 million in compensatory damages, $1.224 million in punitive damages, and post-judgment interest to accrue at the rate of 6.46 percent per annum. The court subsequently amended its judgment to correct a clerical error. The amended judgment awarded $26,861,312.78 in compensatory damages and prejudgment interest, and the punitive damage award and rate of post-judgment interest remained the same. On February 24, 1992, the district court filed its Findings of Fact and Conclusions of Law. The Fifth Circuit Court

of Appeals affirmed the district court's judgment.

On August 5, 1991, both Bilzerian and BFC filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code (the "Code"). After the United States Supreme Court denied certiorari in another case involving Bilzerian's conviction for securities fraud, Bilzerian's bankruptcy case was converted to one under Chapter 7. HSSM filed a Complaint To Determine Dischargeability Of Debt and Objecting to Discharge in bankruptcy court against Bilzerian. HSSM objected to the discharge of the judgment debt Bilzerian owed to HSSM, as well as to Bilzerian's general discharge. Count one of the adversary complaint—the only count relevant to this appeal—alleged that Bilzerian's judgment debt to HSSM was a debt for money obtained by actual fraud and was thereby excepted from discharge under 11 U.S.C. § 523(a)(2)(A). (FN1)

HSSM filed a motion for summary judgment on count one alleging that, under principles of collateral estoppel, the debt arising from the Texas judgment was nondischargeable because it was obtained by fraud. Bilzerian filed a cross motion for summary ***889** judgment arguing, among other issues, that collateral estoppel should not apply because the Texas court did not actually litigate several issues, such as whether Bilzerian had directly received any money or property as a result of the alleged fraud, and whether HSSM had failed to show that it sustained a loss as a result of Bilzerian's false representations. The bankruptcy court concluded that in order for a debt to be excepted from discharge under § 523(a)(2)(A), "the Debtor himself must obtain the money, property, services ... by misrepresentation, false pretenses or actual fraud." HSSM # 7 Limited Partnership v. Bilzerian (In re Bilzerian), 162 B.R. 583, 589 (Bankr.M.D.Fla.1993). Accordingly, the bankruptcy court granted summary judgment in favor of Bilzerian because it found that the evidence in the Texas case did not show that Bilzerian individually obtained any money or property from HSSM. On appeal the district court rejected the bankruptcy court's interpretation of § 523(a)(2)(A) and concluded that the provision requires only that the debtor receive some benefit, even if indirectly. The district court found that Bilzerian received a benefit from HSSM's investment in his business venture and that the issue of fraud was actually and necessarily litigated in the Texas case such that collateral estoppel precluded litigating the fraud issue again in the bankruptcy dischargeability proceeding. Bilzerian then perfected this appeal.

II. ISSUES

We address the following issues on appeal:

(1) whether a debtor, who did not individually receive the fruits of his or her fraud, but nevertheless received some benefit, has obtained "money, property, services, or an extension, renewal or refinancing of credit" for purposes of 11 U.S.C. § 523(a)(2)(A); and

(2) whether collateral estoppel prevents relitigation of elements necessary to render Bilzerian's debt excepted from discharge under 11 U.S.C. § 523(a)(2)(A).

III. STANDARD OF REVIEW

[1] Because the district court functions as an appellate court in reviewing bankruptcy court decisions, this court is the second appellate court to review bankruptcy court cases. Haas v. I.R.S. (In re Haas), 31 F.3d 1081, 1083 (11th Cir.1994), cert. denied, — U.S. ——, 115, S.Ct. 2578, 132 L.Ed.2d 828 (1995). This court reviews determinations of law, whether from the bankruptcy court or the district court, de novo. Id. By contrast, this court reviews the bankruptcy court's factual findings under the clearly erroneous standard. Id.

IV. ANALYSIS

A. 11 U.S.C. § 523(a)(2)(A) Exception From Discharge

The issue of exception of debts from discharge is governed by 11 U.S.C. § 523. Section 523(a)(2)(A) provides that "[a] discharge [in bankruptcy] does not discharge an individual debtor from any debt ... for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by ... false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition[.]" (emphasis added). This appeal involves the meaning of the word "obtain" in § 523(a)(2)(A).

Bilzerian contends that in order for the exception to discharge found

in § 523(a)(2)(A) to apply, a debtor must directly obtain the money or property in question. Thus, he concludes that since he was not the direct recipient of HSSM's investment, § 523 is inapplicable to him. The bankruptcy court accepted Bilzerian's argument. (FN2) The district *890 court, however, disagreed with this rather narrow reading of § 523(a)(2)(A).

[2] This issue is one of first impression in the Eleventh Circuit. Three views have emerged regarding the issue of whether a debtor must personally receive money before the exception to discharge of § 523(a)(2)(A) can apply. The first view, which was adopted by the bankruptcy court and is the narrowest, requires that the debtor personally receive the fruits of the fraud. (FN3) The second view, which was adopted by the district court, is termed the "receipt of benefits" theory. This theory requires that the debtor gain a benefit from the money that was obtained by fraudulent means. (FN4) A third view, which is the broadest, requires simply that a debtor obtain money by fraudulent means such that a debtor does not necessarily have to receive money personally or receive any benefit at all. (FN5)

The bankruptcy courts diverge on this question; however, the three circuit courts that have considered the issue have rendered decisions favoring the "receipt of benefits" theory. See BancBoston Mortgage Corp. v. Ledford (In re Ledford), 970 F.2d 1556 (6th Cir.1992), cert. denied, 507 U.S. 916, 113 S.Ct. 1272, 122 L.Ed.2d 667 (1993); Luce v. First Equip. Leasing Corp. (In re Luce), 960 F.2d 1277 (5th Cir.1992); Ashley v. Church (In re Ashley), 903 F.2d 599 (9th Cir.1990). We agree with our sister circuits that the "receipt of benefits" theory is the more well-reasoned approach.

The Ninth Circuit's opinion in Ashley is the most analogous to the instant case. In Ashley, the debtor was involved in a plan to finance, establish, and develop machine shops. Like Bilzerian, the debtor in Ashley argued that he did not receive the money for himself. However, the debtor had contributed to loans to keep the business afloat, and the debtor's conduct in arranging the loans from the creditors was part of "a business plan to gain a foothold in the machine shop industry." Ashley, 903 F.2d at 604. Although the Ninth Circuit found the debtor's connection to the business to be somewhat attenuated, the court nevertheless concluded that it "placed him in a position to benefit from any infusion of capital to that enterprise."

Id. (FN6)

***891** The Fifth and Sixth Circuits addressed the meaning of "obtain" in § 523 in the context of deciding whether the fraud of a partner should be imputed to an "innocent" partner. Both circuits concluded that the claim against the innocent partner was subject to § 523 because the "innocent" partner received benefits from the fraudulent conduct. Ledford, 970 F.2d at 1561-62; Luce, 960 F.2d at 1281-83. But see Allison v. Roberts (In re Allison), 960 F.2d 481, 486 (5th Cir.1992) (declining to impute the fraudulent acts of one spouse to the other uninvolved spouse).

[3] If it is acceptable to impute the fraud of one partner to other partners who had no knowledge of the fraud simply because they received a benefit, then it is certainly logical to hold Bilzerian responsible here because of his active participation in the fraud and his receipt of benefits therefrom. Suncoast was composed of HSSM, as sole limited partner, and BFC as the general partner. (FN7) Bilzerian induced HSSM to invest in Suncoast. As the other partner in Suncoast, BFC stood to benefit from HSSM's $20.4 million investment in Suncoast. In addition, Bilzerian's connections with the companies "placed him in a position to benefit from any infusion of capital to that enterprise." Ashley, 903 F.2d at 604. Furthermore, the district court in Texas found that "Bilzerian personally had an override of 25% on the partnership investment by Suncoast in Bilzerian Partners Limited Partnership 1 (BPLP-1) and in Bilzerian Partners Limited Partnership, Series B (BPLP-B)." Findings of Fact and Conclusions of Law, BR42, Ex. F at 2. (FN8)

[4] [5] It is true that courts should narrowly construe exceptions to discharge against the creditor and in favor of the debtor. See St. Laurent v. Ambrose (In re St. Laurent), 991 F.2d 672, 680 (11th Cir.1993). However, granting a debtor a discharge based solely on the fact that he or she did not directly receive a benefit places a limitation on § 523 that is not apparent from the text of the provision itself. Moreover, such a limitation would provide a dangerous incentive for the sophisticated debtor, who could circumvent the provision by creating a shell corporation to receive the fruits of his or her fraud. As we have previously stated, we will not allow "the malefic debtor [to] hoist the Bankruptcy Code as protection from the full consequences of fraudulent conduct." St. Laurent, 991 F.2d at 680.

In light of persuasive circuit authority, we conclude in this case that the district court properly applied the "receipt of benefits" theory in concluding that Bilzerian's debt to HSSM was subject to the § 523(a)(2)(A) exception to discharge. (FN9)

B. Collateral Estoppel

[6] Bilzerian also faults the district court for applying the principles of collateral estoppel to deny the discharge of his debt to HSSM. He argues that HSSM suffered no loss as a result of his allegedly fraudulent representations. HSSM contends that as a result of the Texas judgment, Bilzerian is *892 collaterally estopped from relitigating the elements of § 523(a)(2)(A).

[7] [8] [9] Collateral estoppel prevents the relitigation of issues already litigated and determined by a valid and final judgment in another court. It is well-established that the doctrine of collateral estoppel applies in a discharge exception proceeding in bankruptcy court. See Grogan v. Garner, 498 U.S. 279, 284 n. 11, 111 S.Ct. 654, 658 n. 11, 112 L.Ed.2d 755 (1991); Hoskins v. Yanks (In re Yanks), 931 F.2d 42, 43 n. 1 (11th Cir.1991). However, collateral estoppel only applies if the following elements are present:

(1) The issue in the prior action and the issue in the bankruptcy court are identical;

(2) The bankruptcy issue was actually litigated in the prior action;

(3) The determination of the issue in the prior action was a critical and necessary part of the judgment in that litigation; and

(4) The burden of persuasion in the discharge proceeding must not be significantly heavier than the burden of persuasion in the initial action.

Bush v. Balfour Beatty Bahamas, Ltd. (In re Bush), 62 F.3d 1319, 1322 (11th Cir.1995) (citation omitted).

[10] [11] In order to prevail on its § 523(a)(2)(A) claim, HSSM as the creditor must prove by a preponderance of the evidence the following ele-

ments: (1) the debtor made a false representation with intent to deceive the creditor; (2) the creditor relied on the representation; and (3) the creditor sustained a loss as a result of the representation. St. Laurent, 991 F.2d at 676-77. Moreover, the creditor's reliance must be justified. See Field v. Mans, — U.S. ——, ——, 116 S.Ct. 437, 445-46, 133 L.Ed.2d 351 (1995); City Bank & Trust Co. v. Vann (In re Vann), 67 F.3d 277, 281 (11th Cir.1995). The Texas court instructed the jury regarding fraud as follows:

In order to establish that it was defrauded by Defendants, HSSM must prove: (1) that a material representation of fact, either past or present, was made by Mr. Bilzerian; (2) that it was false; (3) that when the misrepresentation was made, Mr. Bilzerian knew it was false or made it recklessly without any knowledge of its truth; (4) that Mr. Bilzerian made the misrepresentation with the intention that HSSM act on it; and (5) that HSSM acted in reliance on the representation.

BR42, Ex. C at 6. The issues presented to the jury in the Texas case are almost identical to the issues in the bankruptcy case. The only difference is that the Texas court instructed the jury that HSSM's reliance on the representation must be "reasonable" instead of justifiable. See id. The reasonable reliance standard is more stringent than is the justifiable reliance standard. Vann, 67 F.3d at 280. Thus, by meeting the more stringent standard, HSSM has satisfied the reliance element. (FN10)

Furthermore, the fraud issue was actually litigated in the Texas case during a seven-day trial, and the issue was a necessary part of the Texas judgment. HSSM was required to prove its case by a preponderance of the evidence, the same burden applied to § 523(a) discharge cases. The elements of collateral estoppel are present in this case. Accordingly, Bilzerian was properly estopped from relitigating the fraud issue in the bankruptcy court.

Finally, Bilzerian's argument that HSSM did not sustain a loss is meritless in light of ***893.** the money judgment entered in favor of HSSM in the Texas case.

V. CONCLUSION

For the foregoing reasons, we affirm the district court's judgment reversing the bankruptcy court's order.

AFFIRMED. (FN11)

FN1. All the other counts alleged in HSSM's adversary complaint have been dismissed or resolved.

FN2. The bankruptcy court found as follows:

> There is nothing in this record, or the record of the Texas litigation, to establish the fact that Bilzerian individually obtained any money or property from HSSM. In fact, HSSM's entire investment was received by Suncoast, not Bilzerian. For a debt to be deemed nondischargeable pursuant to § 523(a)(2)(A), the Debtor himself must obtain the money, property, services or an extension, renewal or refinancing of credit by misrepresentation, false pretenses or actual fraud. Inasmuch as Bilzerian never received any money, property, services, or an extension, renewal or refinancing of credit from HSSM, this Court is satisfied that it is appropriate to deny HSSM's Motion as to Count I ...

Bilzerian, 162 B.R. at 589-90 (citations omitted) (emphasis added).

FN3. This view originated in Rudstrom v. Sheridan, 122 Minn. 262, 142 N.W. 313 (1913). The Rudstrom court found that: "

> In order ... to bring the statute into operation, and prevent the full discharge of the bankrupt, it should be made to appear that property of some kind, tangible or intangible, was thus obtained by him." Id. 142 N.W. at 314. However, as the bankruptcy court noted in Simmons v. Wade (In re Wade), 43 B.R. 976 (Bankr.D.Colo.1984), the creditor in Rudstrom suffered no loss and thus failed to prove the elements of fraud; therefore, this language in Rudstrom was dictum. Id. at 980-81.

FN4. We also note, as did the district court, that Bankruptcy Chief Judge Paskay previously advocated the "receipt of benefits" theory:

> According to one view, unless the debtor actually obtained money or property for himself through false representations, the debt remains dischargeable. The better view, however, appears to be that the debtor need not actually procure the money or property for himself. If the debtor benefits in some way from the property obtained through his deception, the debt is nondischargeable.

Century First Nat'l Bank v. Holwerda (In re Holwerda), 29 B.R. 486, 489 (Bankr M.D.Fla.1983) (citations omitted). Thus, Chief Judge Paskay's language in Bilzerian evidences a dramatic shift away from the "receipt of benefits" theory. As a result of this shift, the Eastern District of Pennsylvania cited Bilzerian for the proposition that property received by fraud must be obtained by the debtor personally for purposes of § 523(a)(2)(A). See Sears, Roebuck and Co. v. Naimo (In re Naimo), 175 B.R. 878, 880 (Bankr.E.D.Pa.1994).

FN5. For a thorough discussion of these three theories, see Jacobs v. Mones (In re Mones), 169 B.R. 246, 250-53 (Bankr.D.C.1994), and Wade, 43 B.R. at 980-82.

FN6. The Ninth Circuit explained the debtor's benefit in the following statement:

> One may characterize this event in either of two ways: (a) [the debtor] was sufficiently closely related to AMM to be considered a recipient of the $61,000 loan; or (b) although not a recipient of the $61,000, [the debtor] did profit because he had a financial interest in AMM. On either theory, [the debtor] obtained "money, property, services, ... or ... credit" for himself.

Ashley, 903 F.2d at 604 n. 5.

FN7. In his brief, Bilzerian refers to BFC as "one of my companies." Appellant's Initial Br. at 6. In addition, Bilzerian admitted to the following

sentence in HSSM's Complaint To Determine Dischargeability Of Debt And Objecting To Discharge: "HSSM is a limited partner in an entity known as Suncoast ... a Bilzerian controlled partnership, and in which Bicoastal Financial Corporation ... is the general partner." BR1 at 1; BR31 at 1 (emphasis added).

*894_ FN8. When discussing the value of HSSM's interest in Suncoast, the district court commented about the interrelationships among these companies and partnerships as follows:

> HSSM's limited partnership interest in Suncoast is a unique asset of a peculiar character and value because it is an interest in a limited partnership with a narrow purpose and due to Mr. Bilzerian's control of the investment and the interrelationships of Suncoast, BPLP-1, and BPLP-B....

Findings of Fact and Conclusions of Law, BR42, Ex. F at 3.

FN9. Bilzerian criticizes the district court for making its own review of the Texas record to determine if he received a benefit and thus making its own fact-findings rather than accepting those of the bankruptcy court. The district court did re-construct and present a version of the facts in the Texas court that was not contained in the jury instructions or the Texas district court's factual findings. However, we are persuaded from the jury instructions, the Findings of Fact and Conclusions of Law of the district court in Texas, and Bilzerian's own admissions to HSSM's adversary complaint, that he obtained a benefit.

FN10. Bilzerian argues that because HSSM alleged four misrepresentations, one of which he claims is insufficient under § 523(a)(2)(A), and because the jury rendered a general verdict, the issues in the Texas litigation were different from those in the bankruptcy proceeding. Bilzerian is concerned about the misrepresentation HSSM alleged that he made regarding his net worth. The Fifth Circuit rejected Bilzerian's multiple theory argument as meritless but gave no reasons for its conclusion. HSSM # 7 Limited Partnership v. Bilzerian, No. 92-1261, 988 F.2d 1209 (5th Cir. March 9, 1993) (per curiam). However, the district court in Texas specifically found that without the "put," HSSM would not have become a partner

in Suncoast. Findings of Fact and Conclusions of Law, BR42, Ex. F at 2. Thus, the jury verdict, when taken in conjunction with the Texas district court's finding, compels the conclusion that Bilzerian was found to have made misrepresentations on topics other than his net worth.

FN11. We deny all pending motions filed by the appellant and the appellee.

APPENDIX B

MEMORANDUM ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA FILED JULY 31, 1995

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

In re:

PAUL A. BILZERIAN,

Debtor.

District Court Case
No. 93-2149-Civ-T-23

_____/

HSSM #7 LIMITED PARTNERSHIP,

Appellant,

On Appeal from the United States Bankruptcy Court for the Middle District of Florida, Tampa Division

v.

PAUL A. BILZERIAN,

Case No. 91-10466-BKC-8P7

Appellee.

Adversary No. 92-573

_____/

MEMORANDUM OPINION

This appeal arises out of a multi-count complaint in an adversary proceeding filed by Creditor/Appellant, HSSM #7 Limited Partnership ("HSSM") against Debtor/Appellee, Paul A. Bilzerian ("Bilzerian"), in which HSSM sought a ruling that the debt owing by Bilzerian was nondischargeable. HSSM appeals from a final order of the Bankruptcy Court for the Middle District of Florida (the "Bankruptcy Court") on HSSM's Motion

for Partial Summary Judgment and Paul A. Bilzerian's Motion for Judgement on the Pleadings of Counts II and III [sic] and Motion for Summary Judgment of Count I, dated November 1, 1993 (the "Order"). The Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 158(a).

Factual Background

The relevant facts before the Bankruptcy Court were undisputed and a recitation of the facts which are germane to this appeal follows. In 1987, HSSM invested $20,400,000.00 in an entity known as Suncoast Partners Limited Partnership ("Suncoast"), a Florida limited partnership. HSSM was the sole limited partner in Suncoast and Bicoastal Financial Corporation ("BFC") was its general partner. When HSSM made its investment in Suncoast, Bilzerian was the controlling shareholder and president of BFC. As a result of the Bilzerian's control of BFC, Suncoast invested in another entity known as Bilzerian Partners Limited Partnership 1 ("BPLP-1"), of which BFC, Bilzerian, and other of Bilzerian's companies were partners.[1] BPLP-1 was formed to acquire the common stock of the Singer Company (and ultimately was successful in the takeover of Singer), now known as Bicoastal Corporation. Bilzerian had a 25% override on the profits from Suncoast's partnership investment in BPLP-1.

In January 1990, HSSM instituted a lawsuit in the United States District Court for the Northern District of Texas (the "Texas Court") against Bilzerian and BFC in the case styled HSSM #7 Limited Partnership v. Bilzerian and Bicoastal Financial Corporation, No. CA3-89-0963-R (N.D. Tex. 1991), aff'd, No. 92-1261 (5th Cir. March 9, 1993). The Texas case arose out of HSSM's allegations that Bilzerian made several misrepresentations to HSSM (including representations of his skill in securities transactions and his agreement to repurchase HSSM's interest in Suncoast) in order to induce HSSM to invest in Suncoast. On July 30, 1990, the jury in the Texas case answered special interrogatories and returned a verdict in favor of HSSM and against Bilzerian and BFC, jointly and severally, for over $20 million. The Texas Court instructed the jury that it had to make the following findings in order to find fraud:

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[1]In fact, the sole purpose of Suncoast was to invest in BPLP-1 See Trans. II-22.

> In order to establish that it was defrauded by Defendants, HSSM must prove: (1) that a material representation of fact, either past or present, was made by Mr. Bilzerian; (2) that it was false; (3) that when the misrepresentation was made, Mr. Bilzerian knew it was false or made it recklessly without any knowledge of its truth; (4) that Mr. Bilzerian made the misrepresentation with the intention that HSSM act on it; and (5) that HSSM acted in reliance on the representation.

On April 2, 1991, the Texas Court entered a judgment on the jury verdict which determined that Bilzerian and BFC (i) fraudulently induced HSSM to execute the Suncoast Limited Partnership Agreement and (ii) were guilty of actual fraud. The Court rescinded the Suncoast Limited Partnership Agreement and ordered Bilzerian and BFC to pay to HSSM $19,839,000 in compensatory damages, plus $1,224,000 in punitive damages, and post-judgment interest would accrue at the rate of 6.46 percent per annum. By order dated April 11, 1991, the Court amended its earlier judgment to correct a clerical error. The amended judgment awarded $26,861,312.78 in compensatory damages and prejudgment interest. The punitive damage award and the rate of post-judgment interest remained the same. By order dated February 24, 1992, the Court also awarded HSSM $20,006.75 in costs.

The Texas Court entered its findings of fact and conclusions of law on February 24, 1992. In its ruling, the Texas Court specifically found in pertinent part:

> Mr. Bilzerian personally had an override of 25% on the partnership investment by Suncoast in Bilzerian Partners Limited Partnership 1 (BPLP-1) and in Bilzerian Partners Limited Partnership, Series B (BPLP-B).
>
> . . .
>
> HSSM's Limited partnership interest in Suncoast is a unique asset of a peculiar character and value because it is an interest in a limited partnership with a narrow purpose and due to Mr. Bilzerian's control of the investment and the interrela-

tionships of Suncoast, BPLP-1, and BPLP-B, Mr. Bilzerian and his corporations.

Bilzerian appealed the judgment of the Texas Court to the Fifth Circuit Court of Appeals and on March 9, 1993, the Court of Appeals affirmed.

On August 5, 1991, both Bilzerian and BFC filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code. Bilzerian's case was later converted to one under Chapter 7. Neither Bilzerian nor BFC ever satisfied the judgment awarded to HSSM in the Texas case.

On July 24, 1992, HSSM filed its complaint to determine dischargeability of debt and objection to discharge in the Bankruptcy Court. Count I of the complaint, the only Count relevant to this appeal, asserted that Bilzerian's debt to HSSM was nondischargeable pursuant to 121 U.S.C. § 523(a)(2)(A) because it "arose as a result of Bilzerian's obtaining money and property as a result of false pretenses, false representations and/or actual fraud." HSSM filed a motion for summary judgment on Count I of the complaint on the basis that the Texas judgment established, as a matter of law, that the debt is nondischargeable under §523(a)(2)(A) and that collateral estoppel applies to preclude the Bankruptcy Court from retrying the issues resolved in the Texas case.

On April 14, 1993, Bilzerian cross moved for summary judgment on Count I.[2] In his motion for summary judgment, Bilzerian claimed that collateral estoppel did not apply to the dischargeability action because the Texas Court did not actually litigate several issues relevant to a determination of dischargeability under § 523(a)(2)(A), namely that Bilzerian obtained money or property from HSSM, and that HSSM suffered a monetary loss.

On November 1, 1993, thee Bankruptcy Court entered the Order which is the subject of the present appeal. In relevant part, the Order grant-

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[2]Also on April 14, 1993, Bilzerian filed a motion for judgment on the pleadings on Counts II and III of the complaint. The Court need not address the Bankruptcy Court's ruling in regard to this motion because only the summary judgment on Count I is before the Court for review.

ed Bilzerian's motion for summary judgment on Count I and held that the Texas judgment did not collaterally estop the Bankruptcy Court from declaring the debt dischargeable under § 523(a)(2)(A). After considering the record, jury verdict and judgment in the Texas case, the Bankruptcy Court concluded:

> To prevail on this claim [§ 523(a)(2)(A)], HSSM must establish by the record that the verdict of the jury and the Judgment entered on the same clearly found that : (1) Bilzerian himself obtained money, property, services, or an extension, renewal, or refinancing of credit by false pretenses, a false representation, or actual fraud; and (2) HSSM suffered a monetary loss as a result of Bilzerian's false pretenses, misrepresen-tations or actual fraud.
>
> . . .
>
> [T]he jury found Bilzerian and BFC 'guilty of actual fraud' and ordered them to pay HSSM compensatory damages, punitive damages, prejudgment and post-judgment interest, and all costs incurred by reason of the trial. There is nothing in this record, or the record of the Texas litigation, to establish the fact that Bilzerian individually obtained any money or property from HSSM. In fact, HSSM's entire investment was received by Suncoast, not Bilzerian. For a debt to be deemed nondis-chargeable pursuant to § 523(a)(2)(A), the Debtor himself must obtain the money, property, services, or an extension, renewal, or refinancing of credit by misrepresentation, false pretenses or actual fraud. Inasmuch as Bilzerian never received any money, property, services, or an extension, renewal, or refinancing of credit from HSSM, this Court is satisfied that it is appropriate to deny HSSM's Motion as to Count I, grant Bilzerian's Motion and declare the debt owed by Bilzerian to HSSM to be dischargeable based on § 523(a)(4)[sic].

Order, Nov. 1, 1993. (Citations omitted).

HSSM advances several arguments on appeal from the Order. HSSM

contends that (i) the Bankruptcy Court erred when it required HSSM to demonstrate that Bilzerian individually received money, property, services or an extension of credit under § 523(a)(2)(A); (ii) Bilzerian received direct financial benefit from his fraud-ulent conduct, thus justifying a finding of nondischargeability; and (iii) the Texas judgment collaterally estopped Bilzerian from arguing the remaining elements of § 523(a)(2)(A) before the Bankruptcy Court regarding the compensatory and punitive damage awards.

To the contrary, Bilzerian contends that since HSSM's investment in Suncoast was never transferred to Bilzerian personally, the debt does not fall within the reach of § 523(a)(2)(A). As an alternative ground for declaring the debt dischargeable, Bilzerian asserts that HSSM did not establish a monetary loss because the Texas case was an action for recission.

Standard of Review

The United States District Court functions as an appellate court in reviewing decisions of the Bankruptcy Court. In re Williamson, 15 F.3d 1037, 1038 (11th Cir. 1994). Thus, while the Court reviews on a de novo basis the legal conclusions of the Bankruptcy Court, the Court must accept the Bankruptcy Court's findings of fact unless those findings are clearly erroneous. Rule 8013, Fed. R. Bankr. P.; In re Goerg, 930 F.2d 1563, 1566 (11th Cir. 1991). The grant or denial of summary judgment is a legal conclusion subject to de novo review. Resolution Trust Corp. v. Dunmar Corp., 43 F.3d 587, 591 (11th Cir. 1995).

Discussion

HSSM's claim of nondischargeability is based on § 523(a)(2)(A) which provides:

> (a) A discharge under section 727 '... of this title does not discharge an individual debtor from any debt — (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by — (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition.

11 U.S.C. § 523(a)(2)(A).

To establish that a debt should be excepted from discharge under § 523(a)(2)(A), a plaintiff must demonstrate the following four elements:

(1) the debtor made a false representation with the purpose and intention of deceiving the creditor;

(2) the creditor relied on such represen-tation;

(3) the reliance was reasonably founded; and

(4) the creditor sustained a loss as a result of the representation.

In re Pollitt, 145 B.R. 353, 355 (Bankr. M.D. Fla. 1992). A plaintiff has the burden to show each of these elements by a preponderance of the evidence. Grogan v. Garner, 498 U.S. 279, 111 S.Ct. 654 (1991).

The jury in the Texas case, in accordance with the jury instructions, addressed each of these elements. As a consequence, the jury found Bilzerian to have fraudulently induced HSSM's investment in Suncoast and awarded punitive damages against him. HSSM urged the Bankruptcy Court to employ collateral estoppel and declare the debt nondischargeable, but the Bankruptcy Court did not do so. Instead, after examining the record of the Texas case, Chief Judge Paskay determined that there was no evidence to show that Bilzerian "obtained money" from HSSM for himself, and as such, the debt did not fall within the scope of § 523(a)(2)(A).

The threshold issue therefore is whether Bilzerian's debt to HSSM is a debt for "obtaining money." Courts disagree whether a debtor himself must actually receive the money that he or she has obtained by fraud before nondischargeability can apply. Three different views have emerged.[3] The first view, which the Bankruptcy Court followed, requires a debtor to personally receive the money that he or she obtained by fraud. The second view, known as the "receipts of benefits theory," requires only that a debtor

[3]The Eleventh Circuit Court of Appeals has not spoken on this issue.

derive a benefit from the money that was obtained by fraud. Under this view, it is irrelevant for whom the money was obtained. The third view, and the most liberal, requires only that a debtor obtain money by fraudulent means. It is not necessary for a debtor to receive the money for him or herself or to receive any benefit. These three views are discussed at length in In re Mones, 169 B.R. 246 (Bankr. D. D. Col. 1994) and In re Wade, 43 B.R. 976 (Bankr. D. Colo. 1984).

In this district, a line of cases has developed which follows the receipt of benefits theory. In one of his first opinions on the issue, Chief Judge Paskay wrote:

> According to one view, unless the debtor actually obtained money or property for himself through false representations the debt remains dischargeable. The better view however, appears to be that the debtor need not actually procure the money or property for himself. If the debtor benefits in some way from the property obtained through his deception, the debt is nondischargeable.

In re Holwerda, 29 B.R. 486, 489 (Bankr. M.D. Fla. 1983) (emphasis added). Subsequently, Chief Judge Paskay followed this "better view" in numerous cases. See e.g. In re Langworthy, 121 B.R. 903, 907 (Bankr. M.D. Fla. 1990); In re Rubenstein, 101 B.R. 769, 772 (Bankr. M.D. Fla. 1989); In re Vermont, 98 B.R. 581, 583 (Bankr. M.D. Fla. 1989); In re Benson, 36 B.R. 537, 538 (Bankr. M.D. Fla. 1983); In re Richmond, 29 B.R. 555, 559 (Bankr. M.D. Fla. 1983); In re Fallon, 29 B.R., 491, 494 (Bankr. M.D. Fla. 1983). Only recently, and without expressly overruling its earlier decisions, has the Bankruptcy Court espoused the view that a debtor must receive the money for him or herself and any benefit to the debtor is not regarded. See In re Dougherty, 179 B.R. 316, 322 (Bankr. M.D. Fla. 1995) In re Duncan 162 B.R. 905, 910-11 (Bankr. M.D. Fla. 1993).

After conducting a review of the pertinent case law within this jurisdiction and in others, the Court concludes that the receipt of benefits theory is indeed the better view and should have been applied by the Bankruptcy Court (as it has done in past opinions). The Bankruptcy Code lends no support to the view that a debtor must individually receive the money obtained

by fraud. Nowhere in § 523(a)(2)(A) does the statute expressly or impliedly limit the meaning of the term "obtain" to the debtor individually. See In re Winfree, 34 B.R. 879, 883 (Bankr. M.D. Tenn. 1983). Moreover, the Courts which adopt the view that a debtor must individually receive the money offer no other grounds to support such a requirement. See e.g., In re Bilzerian, 162 B.R. 583, 589-90 (Bankr. M.D. Fla. 1993) (Court merely stated that debtor needs to obtain money for himself); Duncan 162 B.R. at 910-11 (same); In re Cohen, 69 B.R. 9, 11 (Bankr. E.D.N.Y. 1986) (same). In the Court's opinion, requiring a debtor to obtain the money for him or herself enables the sophisticated debtor to circumvent § 523. Under this view the debtor can create a corporate shell to receive the fruits of his or her misdeeds and avoid receiving the money individually, thereby rendering § 523(a)(2)(A) meaningless.

To the contrary, the receipt of benefits theory finds ample support in the case law and does not permit a debtor who has committed fraud to shield him or herself with the corporate form.

> Money or property need not be obtained for the debtor personally, if an officer of a corpora-tion has obtained money or property for the corporation through fraud the corporate form will not shield him.

In re Cram, 178 B.R. 537, 541 (Bankr. M.D. Fla. 1995). See e.g., In re Luce, 960 f.2D 1277, 1283 (5th Cir. 1992) (citing Holwerda, 29 B.R. at 489) (funds obtained by debtor went directly to partner-ship, but the debtor as a partner benefitted); In re Ashley, 903 F.2d 599, 604 (9th Cir. 1990) (debtor accountant who was not an officer or director of corporation, but who helped corporation obtain loans as part of his business plan obtained benefit from any infusion of capital to corporation); In re Naimo, 175 B.R. 878, 880 (Bankr. E.D. Pa. 1994), aff'd, 1995 WL 163598 (E.D. Pa. April 6, 1995) (debtor need not personally obtain money or property for debt to be nondischargeable); Vermont, 98 B.R. at 584 (debtor, principal of corporation, obtained benefit when loan made to corporation was procured by fraud); Richmond, 29 B.R. at 559 (debtor obtained benefit from renewal of credit obtained by deceiving credit company that debtor was able to make payments on note); Fallon, 29 B.R. at 494 (debtor who controlled corporation received indirect benefit from creditor's investment in corporation

when debtor used corp-orate entities as conduits through which funds were channeled). Following the receipt of benefits theory does not necessarily make it any easier for a creditor to obtain a finding of nondischarge-ability — this is still a formidable task. Nevertheless, this view has been followed in this district for some time and it presents the reasonable and logical approach to determining nondischargeability where a debtor benefits from his or her fraud.

The Court finds that had the Bankruptcy Court applied the proper view, the receipt of benefits theory under § 523(a)(2)(A), it would have found evidence in the record of the Texas case to support a finding of nondischargeability. Simply put, Bilzerian benefitted by over $20 million (HSSM's investment in Suncoast) which assisted Bilzerian in his successful takeover of the Singer Company through BPLP-1, of which he was a partner. In connection with Bilzerian's takeover of Singer, he was to receive a 25% override on any profits realized by BPLP-1. These profits were derived from Suncoast's initial investment in BPLP-1, and the formation of Suncoast was made possible by HSSM's investment. In its Findings of Fact and Conclusions of Law, the Texas Court specifically found Bilzerian to personally have a 25% override on profits derived from, among other things, the Suncoast partnership investment in BPLP-1 Moreover, Bilzerian received a large bonus in connection with his takeover of Singer. Clearly, Bilzerian benefitted from his fraudulent conduct toward HSSM. The trial transcripts of the Texas case reflect testimony in this regard:

> A. The sole purpose of the Partnership is to invest as a Limited Partner of Bilzerian Partners, Limited Partnership, Series B, a Florida limited partnership and affiliated partnerships.
>
> . . .
>
> Q. You have before you Bilzerian Partners, Limited Partnership 1 and Series B, correct?
>
> A. Yes, I do.
>
> Q. And were these the two partnerships that Suncoast invested in?

A. Yes, they are.

Q. And was the — did some of the purposes of these two partnerships include investing both in public and private companies or taking a company private?

A. Yes, the purpose, as I understood it, was to take the company private as well as possibly invest in public companies.

Q. Is that what happened with the Singer Company?

A. Yes.

Trans. II, pp. 22-23 (testimony of Craig Hall).

Q. You still have a 25 percent override in Bilzerian Partners Limited Partnership 1, is that right?

A. That's correct.

Q. And what does that override mean, please?

A. That represents the amount of profit that I would receive first in the event profits were realized in Bilzerian Partners Limited Partnership 1.

. . .

Q. You didn't tell Mr. Hall, when you met with him on March 19th, that you were getting a $1,250,000 bonus from Singer, did you?

A. I don't remember ever discussing that with him, no.

Trans. IV. pp. 57-75 (testimony of Bilzerian)

Because the record contains evidence of a benefit to Bilzerian from HSSM's investment, the Bankruptcy Court should have addressed the other elements for a case of nondischargeability under § 523(a)(2)(A) — whether (i) Bilzerian made a false representation with the purpose and intention of deceiving HSSM, (ii) HSSM relied on such representation, (iii) HSSM's reliance was reasonably founded, and (iv) HSSM sustained a loss as a result of the representation.

To determine whether these elements were established, the Bankruptcy Court could have looked to the Texas case and applied collateral estoppel principles to the determination of discharge-ability under § 523(a)(2)(A). Although the Bankruptcy Court retains exclusive jurisdiction to decide dischargeability questions, it may invoke collateral estoppel to bar relitigation of issues that were actually litigated and necessary to the earlier decision of the non-bankruptcy court. As stated by the Eleventh Circuit, "issue preclusion [allows] the court to reach conclusions about facts that the court would then consider as 'evidence of nondischargeability.'" In re Halpern, 810 F.2d 1061, 1064 (11th Cir. 1987).

The record in the Texas case shows that the issue presented to the jury required them to find that (i) Bilzerian made a material representation of fact that was false, (ii) Bilzerian made it recklessly or with knowledge that it was false, (iii) Bilzerian intended HSSM to rely on his misrepresentation, and (iv) HSSM acted in reliance on the misrepresentation. See Jury Instructions, p.6. In response to these inquiries, the jury concluded that HSSM proved Bilzerian and BFC to have fraudulently induced HSSM's investment in Suncoast. The Texas judgment reflects this finding.

In addition, the Texas Court employed a preponderance of the evidence standard with regard to HSSM's case against Bilzerian and BFC. Collateral estoppel will apply if the standard of proof in the Texas case was at least as stringent as the standard of proof before the Bankruptcy Court. See In re St. Laurent, 991 F.2d 672, 676 (11th Cir. 1993); In re Scarfone, 132 B.R. 470, 472 (Bankr. M.D. Fla. 1991). The standard of proof for an action under § 523(a)(2)(A) is preponderance of the evidence. Grogan v. Garner, 498 U.S. 279, 111 S.Ct. 654 (1991). Because the Texas Court actually litigated the fraud issue under as stringent a standard of proof as applied by the Bankruptcy Court, and the fraud deter-mination was necessary to the

resolution of the Texas case, collateral estoppel precludes Bilzerian from relitigating these issues before the Bankruptcy Court. Since Bilzerian benefitted from his fraud on HSSM, and because the other elements of dischargeability are satisfied, the Bankruptcy Court should have granted summary judgment in favor of HSSM on Count I and against Bilzerian.

As an alternative ground for affirming the Order of the Bankruptcy Court, Bilzerian argues that HSSM did not prove a monetary loss because the action in Texas was for rescission and not for monetary damages. Bilzerian asserts that because monetary loss is an element of nondischargeability under § 523(a)(2)(A) and it was not tried in Texas, collateral estoppel does not apply. Thus, Bilzerian concludes that all of the elements necessary to prove nondischargeability are not established.

The record in the Texas case shows however that the Court specifically rejected the jury's finding that HSSM's interest in Suncoast had a market value, and instead ordered Bilzerian to pay money damages. The Court rescinded the partnership agreement and ordered Bilzerian and BFC to compensate HSSM for the investment loss it suffered and also awarded punitive damages.

> On its claim of fraud seeking the remedy of rescission, no exceptional circumstances exist to prevent awarding prejudgment interest to HSSM. HSSM is entitled to $20,400,000 plus prejudgment interest as set forth in the court's judgment signed April 2, 1991, in exchange for its partnership interest in Suncoast.

Findings of Fact and Conclusions of Law, pp. 2-3. The judgment of the Texas Court also reflects the monetary loss and essentially, is a money judgment. Chief Judge Paskay acknowledged this very fact.

> THE COURT: So your idea is the judgment is not a money judgment at all, no liability whatsoever?
>
> MR. BILZERIAN: It's a rescission, Judge.
>
> THE COURT: The contract? . . . Mr. Bilzerian, if the sec-

> ond paragraph of the judgment is not a money judgment, I don't know what a money judgment is. It says, "Further Ordered, Adjudged and Decreed that the Defendants, jointly and severally, shall" — to me, "shall" means "shall", not may — "shall pay to plaintiff immediately the sum of $19,839,000, after deducting interest and post-judgment interest as set forth herein below."

Trans. Bankr. Ct. pp. 14-15. Here, the judgment debt established a right to payment in favor of HSSM and includes the rescission of the partnership agreement. Monetary loss is thus part of the judgment and Bilzerian's argument is without merit.

HSSM next argues that the punitive damage portion of the Texas judgment is also nondischargeable. The Court agrees. The Eleventh Circuit Court of Appeals has spoken on this very issue. See In re St. Laurent, 991 F.2d 672, 678 (11th Cir. 1993).

> [P]unitive damage awards flowing from the same course of fraudulent conduct necessitating an award of compensatory damages are not dis-chargeable in bankruptcy under § 523(a)(2)(A).

St. Laurent, 991 F.2d at 678.

Accordingly, upon due consideration, it is ORDERED AND ADJUDGED that the Order on HSSM's Motion for Partial Summary Judgment and Paul A. Bilzerian's Motion for Judgment on the Pleadings of Counts II and III [sic] and Motion for summary Judgment of Count I, dated November 1, 1993 is REVERSED and the case is REMANDED to the Bankruptcy Court for the entry of summary judgment in favor of HSSM consistent with the terms of this Court's memorandum opinion. The Clerk is directed to close the file.

DONE AND ENTERED at Jacksonville, Florida this 28th day of July, 1995.

/s/ _____
HARVEY E. SCHLESINGER
United States District Judge

Copies to: Hon. Steven D. Merryday, United States District Judge
Hon. Alexander L. Paskay, Chief Bankruptcy Judge
Andrew M. Brumby, Esq.
Paul A. Bilzerian, Pro Se

APPENDIX C
MEMORANDUM OPINION AND ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE MIDDLE DISTRICT OF FLORIDA FILED NOVEMBER 16, 1993

Reported at 162 B.R. 583

In re Paul A. BILZERIAN, Debtor.
HSSM # 7 LIMITED PARTNERSHIP, Plaintiff,
v.
Paul A. BILZERIAN, Defendant.

Bankruptcy No. 91-10466-8P7.
Adv. No. 92-573.
United States Bankruptcy Court,
M.D. Florida,
Tampa Division.

Nov. 16, 1993.

Andrew M. Brumby, Shutts & Bowen, Orlando, FL, for plaintiff.

Paul A. Bilzerian, pro se.

ORDER ON HSSM # 7 LIMITED PARTNERSHIP'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND PAUL A. BILZERIAN'S MOTION FOR JUDGMENT ON THE PLEADINGS OF COUNTS II AND III (SIC) AND MOTION FOR SUMMARY JUDGMENT OF COUNT I

ALEXANDER L. PASKAY, Chief Judge.

THIS IS a Chapter 7 liquidation case and the matter under consideration is a twelve ***585** (12) count Complaint filed by HSSM # 7 Limited Partnership (HSSM) seeking a determination that the debt due and owing by Paul A. Bilzerian (Debtor) to HSSM is a nondischargeable debt. In addition, HSSM seeks a denial of the Debtor's right to a discharge. HSSM filed a Motion for Partial Summary Judgment on Counts I, II and III and the

Debtor filed a Motion for Judgment on the Pleadings on Counts II and III (sic) and Motion for Summary Judgment of Count I. In their Motions, both HSSM and the Debtor claim that there are no genuine issues of material facts in Counts I, II, and III, and based on those facts, each party is entitled to judgment as a matter of law in their respective favor. The facts relevant to the Motions under consideration, as they appear from the record, are indeed without dispute and do not present any genuine issues of material facts. Thus, the controversy is ripe for determination as a matter of law. The undisputed facts are as follows:

On January 5, 1990, HSSM commenced a lawsuit against Bilzerian and Bicoastal Financial Corporation (BFC) in the United States District Court for the Northern District of Texas. In its Fifth Amended Complaint, HSSM alleged that Bilzerian made a series of misrepresentations to HSSM to induce HSSM to invest $20,400,000.00 as a limited partner in Suncoast Partners Limited Partnership (Suncoast). In particular, HSSM alleged that Bilzerian and BFC obtained HSSM's investment in Suncoast and its agreement to enter into the Suncoast Limited Partnership Agreement (Suncoast Agreement) by a series of falsehoods. These misrepresentations included a representation by Bilzerian concerning his skill and expertise in legitimate securities transactions and his intentions to live up to a repurchase agreement with HSSM.

In due course, the case was tried by a jury which, on July 30, 1990, returned a verdict in favor of HSSM and against Bilzerian and BFC, jointly and severally. On April 2, 1991, the District Court entered a Judgment on the verdict. In its Judgment, the District Court determined that Bilzerian and BFC were guilty of actual fraud, rescinded the Suncoast Agreement based on fraud in the inducement, and ordered Bilzerian and BFC jointly and severally to pay HSSM $19,839,000.00 in compensatory damages, plus $1,224,000.00 in punitive damages. On April 11, 1991, the District Court entered an Amended Judgment correcting a clerical error in the calculation of the prejudgment interest. The recalculated Judgment was for $26,861,312.78 in compensatory damages and prejudgment interest, and $1,224,000.00 in punitive damages. The recalculated Judgment further provided that the post-judgment interest shall accrue at 6.46% per annum. In addition, by an order dated February 24, 1992, the District Court awarded HSSM $20,006.75 in costs.

On February 24, 1992, the District Court filed its Findings of Fact and Conclusions of Law. The District Court adopted all but one of the findings of the jury. The District Court refused to adopt the jury's answer to Question No. 5, in which the jury determined that there was a market value for HSSM's interest as of December 31, 1988, in Suncoast. The District Court's Judgment was appealed and on March 9, 1993, the Fifth Circuit affirmed the District Court's Judgment.

On August 5, 1991, Bilzerian and BFC each filed their voluntary Petitions For Relief under Chapter 11 of the Bankruptcy Code. On October 22, 1991, after the United States Supreme Court denied certiorari in Bilzerian's conviction for securities fraud, and Bilzerian was incarcerated, his Chapter 11 case was converted to a Chapter 7 case. James C. Orr (Trustee) is the duly appointed and acting Trustee of Bilzerian's estate.

On March 16, 1993, HSSM filed a Motion for Partial Summary Judgment on Counts I, II and III of its Complaint. In its Motion, HSSM contends that Bilzerian is collaterally estopped by the District Court Judgment from having this Court retry the following facts and issues: (1) obtaining money by false pretenses, representation, or actual fraud (Count I, § 523(a)(2)(A)); (2) fraud or defalcation while acting in a fiduciary capacity (Count II, § 523(a)(4)); and (3) willful and malicious injury by Bilzerian to another entity or to the property of another entity (Count III, § 523(a)(6)).

***586** On April 14, 1993, Bilzerian filed an Opposition to HSSM's Motion for Partial Summary Judgment. Bilzerian claims that collateral estoppel cannot be applied in this case because several issues in this case were not actually litigated in the District Court case. Specifically, Bilzerian contends that, in order to prevail under § 523(a)(2)(A), the record must establish that the creditor sustained an actual monetary loss as a result of the alleged misrepresentations, and this record is devoid of any evidence of this because: (1) the District Court in Texas did not adjudicate that Bilzerian "obtained any money from HSSM"; (2) Bilzerian's misrepresentations were not in writing; (3) mere silence on the part of Bilzerian did not establish the fact that he willfully concealed or omitted material facts; and (4) the jury, in rescinding the contract, did not find that HSSM suffered any monetary loss. In order to prevail under § 523(a)(4), Bilzerian contends that the record must show that he was acting in a fiduciary capacity, and while act-

ing in that capacity committed either fraud or defalcation or was guilty of embezzlement or larceny. Bilzerian contends that it is clear from this record that: (1) Bilzerian could not have been acting as a fiduciary vis-a-vis HSSM prior to the execution of the Suncoast Agreement; and (2) there is no allegation in the Complaint and there is nothing in the record that even refers to an act of embezzlement or larceny. Finally, to prevail under § 523(a)(6), Bilzerian contends that the record must establish that Bilzerian did willfully and maliciously cause injury to HSSM or to the property of HSSM. Bilzerian claims HSSM failed in this respect because: (1) the District Court in Texas determined that Bilzerian acted only recklessly, a finding which falls short of the willful and malicious standard required by § 523(a)(6); (2) the jury didn't determine that HSSM suffered any monetary loss when the contract was rescinded; (3) the issue of malice was not even involved in the Texas case; and (4) there is no allegation of injury to the property of HSSM in the Complaint.

On April 14, 1993, Bilzerian filed a Motion for Judgment on the Pleadings directed to the claims of HSSM set forth in Counts II and III and Motion for Summary Judgment directed to the claim in Count I. In its Motion, Bilzerian alleged, setting forth the same contentions asserted in his Opposition to HSSM's Motion for Partial Summary Judgment, that he was entitled to: (1) Judgment on the pleadings of Counts II and III; (2) Judgment on Count I; or, in the alternative, (3) dismissal of all three Counts for failure to state a cause of action.

[1][2] The application of collateral estoppel or issue preclusion is generally recognized in litigation involving the question of dischargeability of a specific debt owed by the Debtor. *In re Halpern,* 810 F.2d 1061 (11th Cir.1987). In order for collateral estoppel to apply, four elements must be established: (1) the issue at stake must be identical to the one decided in the prior litigation; (2) the issue must have been actually litigated in the prior proceeding; (3) the prior determination of the issue must have been a critical and necessary part of the Judgment in that earlier decision; and (4) the standard of proof in the prior action must have been at least as stringent as the standard of proof in the later case. *In re St. Laurent,* 991 F.2d 672 (11th Cir.1993).

[3] In light of the record and the undisputed facts, this Court is satis-

fied that it is appropriate to dispose of most of the issues under consideration as a matter of law. For the sake of clarity, this Court shall deal with the respective contentions of the parties concerning each of the issues in Counts I, II and III in reverse order. First, to prevail on the claim set forth in Count III, HSSM must establish by the record that: (1) the District Court determined that Bilzerian committed a willful and malicious act which injured HSSM or the property of HSSM; and (2) the Texas litigation established, with the requisite degree of proof, all operating elements of a non-dischargeable claim pursuant to § 523(a)(6) of the Bankruptcy Code, which provides:

(a) a discharge under Section 727 ... of this title does not discharge an individual debtor from any debt—

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity.

***587** For the act to be malicious, it must result in an injury arising from a willful act done wrongfully and without just cause or excuse. S*ee In re Greer,* 21 B.R. 763 (Bankr.D.Ariz.1982).

[4] In the Texas litigation, the jury was specifically instructed that it could only award punitive damages if Bilzerian acted willfully, intentionally, or with callous and reckless indifference to the rights of HSSM. Question 2 to the Court's Instructions to the Jury (Exh. B to the Complaint) states:

> What amount of punitive damages, if any, do you find should be paid by Bicoastal Financial Corporation as a result of its fraud against HSSM? Answer in dollar and cents, if any.
>
> Instructions
>
> The law permits the jury, under certain circumstances, to award punitive damages for the limited purpose of punishing some misconduct and serving as a warning to others not to engage in such misconduct.

> Punitive damages may be awarded only if you find that the acts or omissions of Mr. Bilzerian which caused actual damages to HSSM were done willfully, intentionally or with callous and reckless indifference to the rights of HSSM.
>
> The amount of punitive damages must be based on reason, taking into account all the circumstances, including the nature of the wrong and any aggravating and mitigating circumstances that may be shown. Whether or not to award any punitive damages is a matter exclusively within the discretion of the jury. If you award punitive damages, you also may consider the attorney's fees incurred by Plaintiff which are the sum of $850,000.00.

Based on these Instructions to the Jury, the jury awarded HSSM punitive damages in the amount of $1,224,000.00. It should be noted, however, that a punitive damage award pursuant to these instructions does not necessarily mean that the jury found that Bilzerian committed a willful and malicious act as required to prevail under § 523(a)(6). This is so because under the instructions, the jury could have determined that Bilzerian acted with "reckless disregard", a standard which is no longer the applicable standard. The exception in § 523(a)(6) applies only to the debtor's conduct which is willful and malicious and causes injury to another person or to the property of another person. To the extent that *Tinker v. Colwell,* 193 U.S. 473, 24 S.Ct. 505, 48 L.Ed. 754 (1904), held that a looser standard is intended, and to the extent that other cases have relied on *Tinker* to apply a "reckless disregard" standard, they no longer represent the proper standard. H.R.Rep. No. 595, 95th Cong., 1st Sess. 365 (1977), U.S.Code Cong. & Admin.News 1978, p. 5787. Inasmuch as the jury award failed to distinguish under which standard of proof it awarded punitive damages, this Court is satisfied that it would be inappropriate to come to a final resolution of Count III without further evidence being presented to this Court. Therefore, HSSM's Motion as to Count III should be denied, and Bilzerian's Motion as to Count III should be denied because there remains a genuine issue of material fact which has to be tried.

To prevail on the claims set forth in Count II, the record must establish that the District Court determined the following: (1) Bilzerian was act-

ing in a fiduciary capacity; and (2) while acting in that fiduciary capacity, Bilzerian committed either fraud or defalcation or was guilty of embezzlement or larceny. If both of these elements are established, the liability should be excepted from the overall protection of the general discharge pursuant to § 523(a)(4). The Supreme Court has consistently held that the term "fiduciary" is not to be construed expansively, but instead is intended to refer only to "express" or "technical" trusts. *See Chapman v. Forsyth,* 43 U.S. (2 How) 202, 11 L.Ed. 236 (1844); *Upshur v. Briscoe,* 138 U.S. 365, 11 S.Ct. 313, 34 L.Ed. 931 (1891); *Davis v. Aetna Acceptance Co.,* 293 U.S. 328, 55 S.Ct. 151, 79 L.Ed. 393 (1934). Unfortunately, the Supreme Court has not considered this issue since the *Davis* case, leaving the lower courts to struggle with the concept of "express" or "technical" trusts.

Initially, the lower courts construed this Section to cover only situations where there was a voluntary, express trust between the parties and not a trust created by the operation ***588** of law. See *Chapman,* supra. In addition, it has been generally recognized that the trust relationship had to exist prior to the act creating the debt and without reference to that act. *Reed v. Angelle,* 610 F.2d 1335 (5th Cir.1980). In other words, the basis of a trust which created the fiduciary relationship must have been ex contractu and not as a result of wrongdoing. *Id.*

The difficulty in interpreting § 523(a)(4) was caused by the development of statutory laws which, in certain situations, created an express trust relationship for policy reasons. These Statutes were usually enacted to protect specific individuals, such as principals against the conduct of agents. For example, O.C.G.A. § 33-23-79 created a fiduciary relationship between insurance companies and their agents concerning premiums collected by the agents for policies insured by the insurance companies. A similar Statute was enacted in Florida. See Fla.Stat.Ann. § 626.561 (1993). There have also been Statutes governing the construction industry by declaring that funds received by a contractor were trust funds held for the benefit of suppliers, labor and material. See Neb.Rev.Stat. § 52-123 (1974); N.M.Stat.Ann. § 67-35-26 (1953).

Neither independent research nor research of counsel located any Eleventh Circuit cases which specifically dealt with this problem. The most recent case of *Matter of Cross,* 666 F.2d 873 (5th Cir.1982), decided under

the Bankruptcy Act of 1898, involved a debtor who, acting as an officer of a corporation, was claimed to have been guilty of defalcation by failing to pay subcontractors and suppliers on a construction job to be completed by the officer's corporation. In *Cross*, the Court of Appeals concluded, relying on *Angelle v. Reed*, supra, that the exception to discharge required that there had to be a pre-existing fiduciary duty owed by the debtor to the creditor, and not just a duty owed by the debtor to his employer, the corporation. Thus, the debt was found to be dischargeable because there were no pre-existing contractual or statutory fiduciary duties imposed on the individual officer of the corporation vis-a-vis the creditor.

Recently, the District Court for the Northern District of Georgia, in the case *Quaif v. Johnson*, 4 F.3d 950 (11th Cir.1993) rejected the contention of the Debtor that no trust was created by O.C.G.A. § 33-23-79 because the Statute did not require the res of the trust created by the Statute to be separately identified. In its opinion, the District Court, which was affirmed on appeal by the Eleventh Circuit, conceded that a separation of funds is necessary in some cases to establish the existence of a technical trust. See *Matter of McCraney*, 63 B.R. 64, 67 (Bankr.N.D.Ala.1986); *In re Kelley*, 84 B.R. 225, 230 (Bankr.M.D.Fla.1988). A separation of funds, however, was not required in *Quaif*. In *Quaif*, all premiums collected by the debtor, not only on policies issued by the Plaintiff, but also by other insurance companies, were not maintained in segregated accounts. However, they were placed in a single bank account that was separate from the ordinary operating account of the Debtor and were not commingled with the Debtor's funds. The District Court concluded that this was sufficient "segregation" to satisfy the requirement of a trust, and a fiduciary duty was in fact created by the Statute even prior to the act of defalcation.

[5] The record in this case leaves no doubt that there was neither an express or technical trust created by contract between Bilzerian and HSSM, nor was one created by Statute. The negotiations entered into between Bilzerian and HSSM were nothing more than a simple commercial transaction between sophisticated business people, and it is obvious that there was neither an express nor technical trust established by the execution of the Agreement. This being the case, it is unnecessary to consider whether or not the conduct of Bilzerian amounted to a defalcation which, for the purposes of § 523(a)(4), does not have to rise to the level of fraud, embezzlement, or

even misappropriation. *Central Hanover Bank & Trust Co. v. Herbst*, 93 F.2d 510 (2nd Cir.1937); *See also In re McCormick*, 70 B.R. 49, 51 (Bankr.W.D.Pa.1987); *American Ins. Co. v. Lucas*, 41 B.R. 923 (W.D.Pa.1984). Therefore, this Court is satisfied that it is appropriate to deny HSSM's Motion as to Count II, grant Bilzerian's Motion and declare the debt owed ***589** by Bilzerian to HSSM to be dischargeable based on § 523(a)(4).

This leaves for consideration the claim of HSSM set forth in Count I based on § 523(a)(2)(A) of the Bankruptcy Code. To prevail on this claim, HSSM must establish by the record that the verdict of the jury and the Judgment entered on the same clearly found that: (1) Bilzerian himself obtained money, property, services, or an extension, renewal, or refinancing of credit by false pretenses, a false representation, or actual fraud; and (2) HSSM suffered a monetary loss as a result of Bilzerian's false pretenses, misrepresentations, or actual fraud.

[6][7] In the District Court case, the jury found that "HSSM did prove" that Bilzerian and BFC fraudulently induced HSSM to execute the Suncoast Agreement. Question 1 of the Court's Instructions to the Jury (Exh. B to the Complaint) states:

Do you find from a preponderance of the evidence that Paul Bilzerian and Bicoastal Financial Corporation fraudulently induced HSSM to execute the Suncoast Limited Partnership Agreement?

Answer "HSSM did prove" or "HSSM did not prove" as to each Defendant

Instructions

> In order to establish that it was defrauded by Defendants, HSSM must prove: (1) that a material representation of fact, either past or present, was made by Mr. Bilzerian; (2) that it was false; (3) that when the misrepresentation was made, Mr. Bilzerian knew it was false or made it recklessly without any knowledge of its truth; (4) that Mr. Bilzerian made the misrepresentation with the intention that HSSM act on it; and (5) that

HSSM acted in reliance on the representation. If you find that HSSM acted in reliance on the representation, you also must find that the reliance was reasonable. You are further instructed that a promise to perform some act in the future also can constitute a fraudulent misrepresentation if at the time the promise was made, it was made with the present intent of not performing and with the purpose of deceiving the party to whom the promise was made. Silence may be as misleading as a positive misrepresentation of existing facts; thus, Mr. Bilzerian is under a duty to disclose the whole truth where partial disclosure is itself, a false representation. Future predictions or expressions of personal opinion do not serve as a basis for fraud unless made with the intent to deceive or to conceal facts known to be untrue.

You are further instructed in answering Questions 1A and 1B that if an agent's, employee's, corporate officer's or partner's fraudulent acts are done in the course and scope of employment, or if they are in furtherance of the principal's, employers, corporation's or partnership's business, the principal, employer, corporation or partnership also may be found liable to HSSM. The act of an agent, employee, corporate officer or partner may be within the course and scope of his employment even though there was in fact no benefit to the employer. You are further instructed that if an agent, employee, corporate officer or partner commits fraud while acting within the scope of his employment, he may be individually liable for damages to HSSM even though the principal, employer, corporation or partnership is also liable.

Based on these instructions, the jury found Bilzerian and BFC "guilty of actual fraud" and ordered them to pay HSSM compensatory damages, punitive damages, pre-judgment and post-judgment interest, and all costs incurred by reason of the trial. There is nothing in this record, or the record of the Texas litigation, to establish the fact that Bilzerian individually obtained any money or property from HSSM. In fact, HSSM's entire investment was received by Suncoast, not Bilzerian. For a debt to be deemed nondischargeable pursuant to § 523(a)(2)(A), the Debtor himself must obtain the money, property, services, or an extension, renewal, or refinancing of credit by misrepresentation, false pretenses or actual fraud. See *In re*

Chavez, 140 B.R. 413, 420 (Bankr.W.D.Tex.1992); *In re Burgess*, 955 F.2d 134, 140 (1st Cir.1992); *In re Rifkin*, 142 B.R. 61 (Bankr.E.D.N.Y.1992); *In re Jacobs*, 54 B.R. 791 (Bankr.E.D.N.Y.1985). Inasmuch as Bilzerian never received any money, property, services, or an ***590.** extension, renewal, or refinancing of credit from HSSM, this Court is satisfied that it is appropriate to deny HSSM's Motion as to Count I, grant Bilzerian's Motion and declare the debt owed by Bilzerian to HSSM to be dischargeable based on § 523(a)(4).

Accordingly, it is

ORDERED, ADJUDGED AND DECREED that the Motion for Partial Summary Judgment as to Counts I, II and III filed by HSSM # 7 Limited Partnership against Paul A. Bilzerian be, and is hereby, denied. It is further

ORDERED, ADJUDGED AND DECREED that the Motion for Judgment on the Pleadings on Counts II and III and Motion for Summary Judgment of Count I filed by Paul A. Bilzerian against HSSM # 7 Limited Partnership be, and is hereby, granted in part and the debt owed by Bilzerian to HSSM based on §§ 523(a)(2)(A) and (a)(4) set forth in Counts I and II respectively is hereby determined to be dischargeable. It is further

ORDERED, ADJUDGED AND DECREED that the Motion for Judgment on the Pleadings on Counts II and III and Motion for Summary Judgment on the claim asserted in Count I filed by Paul A. Bilzerian against HSSM # 7 Limited Partnership be, and is hereby, denied in part and the claim of non-dischargeability based on § 523(a)(6) set forth in Count III shall be scheduled for a pre-trial conference before the undersigned in Courtroom A, 4921 Memorial Highway, Tampa, Florida, 33634, on November 16, 1993, at 9:00 am.

DONE AND ORDERED.

APPENDIX D

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITIONER'S MOTION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC DATED FEBRUARY 18, 1997

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-2988

IN RE: PAUL A. BILZERIAN,
Debtor.

HSSM #7 LIMITED PARTNERSHIP,
Plaintiff-Appellee,

versus

PAUL A. BILZERIAN,
Defendant-Appellant.

On Appeal from the United States District Court for the
Middle District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC
(Opinion _____ , 11th Cir., 19____,
_____ F.2d _____).

BEFORE: COX and DUBINA, Circuit Judges, and KRAVITCH, Senior Circuit Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ JOEL F. DUBINA
United States Circuit Judge

ORD-42
(6/95)